The applicant applied to me as a judge of the Federal Court for leave to commence proceedings against the Sabah Government in the Federal Court.

Mr. Peddie for the applicant submitted that, because of clauses (3) and (4) of article 4 and because of article 128, the Federal Court had exclusive jurisdiction to determine the matter which his client intended to bring before the courts, but first the leave of a judge of the Federal Court was necessary.

Clauses (3) and (4) of article 4 read:

"(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause."

Clause (1) of article 128 reads:

"(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any other question between States or between the Federation and any State."

Mr. Peddie conceded that forests were a state subject with respect to which the Sabah legislature had power to make law (item 3(b) of the State List in the 9th Schedule to the Federal Constitution), but argued that in enacting the new subsection it contravened the various articles of the constitution already referred to and thereby exceeded its powers, that therefore the state legislature had no power to make that law within the meaning of article 4(3), and it followed that the new subsection was unconstitutional and for the purpose of seeking a declaration to that effect the applicant had to apply for my leave to bring the matter to the Federal Court.

In the light of *Stephen Kalong Ningkan* v. *Tun Haji Abang Openg & Tawi Sli* (No. 2),[1] *Yeoh Tat Thong* v. *Government of Malaysia & Anor.*[2] and *Ah Thian* v. *Government of Malaysia*[3] I agreed with the learned State Attorney-General of Sabah that the word "matter" in clause (3) of article 4 has the same meaning as the word "matters" in clause (2) of article 74, that as the impugned subsection deals with a state subject, i.e. a matter with respect to which the Sabah legislature has power to make law, the proposed challenge to the validity of the new subsection does not come within clause (4) of article 4 or clause (1)(a) of article 128.

The validity of the new subsection is to be challenged not on the ground that it deals with a matter with respect to which the Sabah legislature has no power to make law (on the contrary, as already stated, it was conceded that it deals with a matter within the competence of that legislature). It is to be challenged on the ground that it is contrary to several provisions of the constitution. The fact, if such be it, that it is so contrary does not mean that it deals with a matter with respect to which the State legislature has no power to make law.

In the circumstances I am of the opinion that clauses (3) and (4) of article 4 do not apply. Accordingly, the Federal Court has no original jurisdiction to determine the dispute between the applicant and the Sabah Government, the High Court has such original jurisdiction, and if the applicant wishes to sue the Sabah Government the leave of a judge of the Federal Court is not required. Finally, I would like to add that, if the applicant sues the Sabah Government, it does not have to specifically ask for a declaration that the subsection is void. Arguments to that effect may be advanced in the usual way during the course of submissions.

Order accordingly.

Solicitors: *Skrine & Co.*

LEE CHICK YET v. CHEN SIEW HEE & ORS.

[O.C.J. (Hashim Yeop A. Sani J.) June 17, 1975]

[Ipoh — Civil Suit No. 288 of 1974]

Charity — Land held in trust for national type primary school — Action by "supporter" of school against trustees and others — Attorney-General joined as a party — Government Proceedings Ordinance, 1956, s. 9.

Government Proceedings Ordinance, 1956, s. 9 — Land held in trust for national type primary school — Action by "supporter" of school against trustees and others — Attorney-General joined as a party.

An action was brought by a "supporter" of a school against trustees and others for a declaration that the transfer of the school land to the other defendants by the trustees was null and void. The defendants objected that the plaintiffs could not take action without joining the Attorney-General as the trust was a charitable trust in law.

Held: in the context of section 9 of the Government Proceedings Ordinance the provisions of subsection (2) did not by itself justify that the whole proceedings should be set aside. The court would make an order that the plaintiff within 2 weeks comply with the provisions of section 9(1).

Cases referred to:-

(1) *Lee Eng Teh & Ors.* v. *Teh Thiang Seong & Anor.* [1967] 1 M.L.J. 42.

(2) *Yeoh Him & Ors.* v. *Yeoh Chong Kang & Ors.* 4 Ky. 500.

(3) *Cheah Ewe Chong & Anor* v. *Cheah Kee Ee & Ors.* [1934] M.L.J. 212.

(4) *Kader Mydin & Ors.* v. *Hadjee Abdul Kader* 1 Ky. 489.

CIVIL SUIT.

Lim Kean Chye and *P.C.Q. Leow* for the plaintiff.

U. Harcharan Singh for the 1st, 2nd and 3rd defendants.

H.L. Sharma for the 4th, 5th, 6th and 7th defendants.

Hashim Yeop A. Sani J.: From the pleadings the following background facts do not seem to be seriously in dispute. By a trust deed made on May 18, 1973 between the first defendant of the one part and the second and third defendants of the other part the parties declared that the land held under State Lease No. 165, Lot 46222 in the Mukim of Ulu Kinta comprising an area of 145,490 square feet were held by them in trust for the sole use and exclusive benefit of the Wan Hwa National Type Primary School (Chinese) otherwise known as the Sekolah Rendah Jenis Kebangsaan (China). On May 30, 1973 they were registered as trustees of the said school land. Sometime before June 4, 1974 the first, second and third defendants purported to transfer the said school land to the fourth, fifth, sixth and seventh defendants and the purported transfer was registered on June 4, 1974. It is also not seriously disputed that the said school is the national type primary school within the meaning of the Education Act 1961 and that besides the government the school also has a number of "supporters" (of whom plaintiff is one) who make donations to the school from time to time.

In dispute are whether the purported transfer of the school land was in breach of the trust and that the resolution of the Board of Management purporting to authorise the transfer was valid or that the transfer was otherwise made in fraud of the school and its supporters and subscribers. In the action the plaintiff seeks to ask for a declaration that the purported transfer was null and void and of no effect and damages against the first three defendants.

On November 6, 1974 an application was made on behalf of the first three defendants to set aside the writ commencing the action on the ground that the plaintiff is not a proper party to the suit and/or that the provisions of section 9 of the Government Proceedings Ordinance 1956 have not been complied with. On February 10, 1975 I gave order in terms in chambers and on June 2, 1975 the application was adjourned to open court for further argument under O.54 r.22A of the Rules of the Supreme Court.

From the bare facts disclosed on the pleadings I am satisfied that the land in question was held in express trust for the sole use and exclusive benefit of a school. It is *prima facie* a public or charitable trust, by public is meant for the benefit either of the public at large or some considerable portion of it answering a particular description.

Section 9(1) of the Government Proceedings Ordinance 1956 says that in the case of any alleged breach of any express or constructive trust for public, religious, social or charitable purposes, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney-General or two or more persons having interest in the trust and having obtained consent in writing of the Attorney-General, may institute a suit or be joined as a party in any existing suit on behalf of the government or the public for the purpose of obtaining reliefs specified in the subsection. Paragraph (i) of this subsection would certainly include the sort of relief asked for by the plaintiff in this case. Subsection (2) of section 9 of that Ordinance gives the following direction: —

"9.(2) No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that subsection."

The arguments advanced on behalf of the first three defendants are straightforward. They are that the plaintiff cannot take action without the Attorney-General on the face of section 9(1) and (2) of the Ordinance, the trust being charitable trust in law and the land being held for the exclusive benefit of a school citing *Lee Eng Teh & Ors.* v. *Teh Thiang Seong & Anor.*[1] money being the subject of the trust in that case and land in the instant case.

In *Halsbury's* Laws of England, Volume 4, at page 440, paragraph 914 states: —

"914. Attorney-General as necessary party. Where an action is necessary to enforce the execution of a charitable purpose, to remedy abuse or misapplication of charitable funds, or to administer a charity, the Attorney-General is generally a necessary party and is normally the proper plaintiff. He may either act alone *ex officio* as the officer of the Crown and, as such, the protector of charities, or ex relatione, that is to say, at the request of a private individual called a relator who thinks the charity is being or has been abused.

Where there are relators the Attorney-General must sign the original writ.

An ordinary action may, with the sanction of the Attorney-General, by amendment of the writ and statement of claim be turned into an action in the nature of an information.

Otherwise actions of this kind, if instituted by parties other than the Attorney-General, or the Solicitor-General, are dismissed."

In *Yeoh Him & Ors.* v. *Yeoh Chong Kang & Ors.*[2] the appeal was based on the grounds, *inter alia*, that the suit ought to have been dismissed as it was only maintainable by the Attorney-General and that such a defect in the suit could not be waived. O'Malley C.J. said in his judgment at page 509:

"The first ground of appeal in this case is, that it can only be maintained by the Attorney-General, and the question raised by this objection is, whether this Society was a public charity. I am of opinion that it is, and I come to that conclusion from the matters stated in the pleadings and the passage in Lewin which was relied on by Mr. Ross. Then the second point is that this objection could not be waived. If the Society is a public charity, the Attorney-General alone could sue. He has not done so, and I think the objection is fatal. I do not see how it can be waived."

Wood J. in his judgment also said at page 510: —

"I am of the same opinion, except that I think the suit ought to be dismissed now. I hold this was a public charity, and the objection that the Attorney-General alone could sue, is fatal and cannot be waived."

In the instant case we must, to get the proper perspective of section 9(1), draw a distinction in the words in that subsection itself that the Attorney-General "*may institute a suit or be joined as a party in any existing suit* on behalf of the government or the public." *Yeoh Him & Ors.* v. *Yeoh Cheng Kang & Ors., supra*, was an appeal to the Court of Appeal when the proceeding was already completed and therefore distinguishable from the present case.

In the case of *Cheah Ewe Chong & Anor.* v. *Cheah Kee Ee & 15 Ors.*[3] it was held that a suit concerning the administration of charities in the Colony

(Penang) following the provision of section 59 of the Crown Suits Ordinance then, in which the commission of various breaches of trusts was alleged against the trustees the suit should be commenced in the name of the Attorney-General as plaintiff. Section 59 of the Colony Ordinance then provided substantially the same as now provided by subsection (3) of the present section 9 of our Ordinance. Whitley J. said in the judgment of *Cheah Ewe Chong's* case: —

"It was argued that the effect of this section is to make it immaterial whether the Attorney-General is plaintiff or defendant so long as he is a party, but I do not think that the section goes so far as that. It does not purport to create a new practice; it merely provides that in suits regarding charities and public interests the practice and the position of the Attorney-General shall be substantially the same as in England and that where he would be a plaintiff in England he should be plaintiff here and where he would be a defendant in England he should be a defendant here.

It is, I think, clear on reference to the authorities that in England in a case such as the present in which breaches of trust are alleged against trustees the proceedings would be by an action in the nature of an information. The proper and formal shape of a suit for determining the mode in which the funds of a charity should be administered was by the information of the Attorney-General. Per Wigram V.C., *Governors of Christ's Hospital* v. *the Attorney-General,* (1846) 5 Hare 257. The Attorney-General appeared before the court not as an ordinary plaintiff endeavouring to obtain redress for a private wrong but rather as one officer of the Crown informing the judge, another officer of the Crown, of some neglect on the defendant's part in the performance of a public duty and demanding a remedy. Under the present practice the title 'information' is not used and an action would be commenced by writ of summons but the action would still be brought by the Attorney-General at the instance of relators, and his consent and authority would be required throughout the proceeding though he does not always act personally."

Whitley J. then described the alternative method in England under Romilly's Act and continued as follows: —

"It is important to note that under either method no proceedings could be instituted without the approval in one form or another of the Attorney-General, and the reasons for insisting upon this safeguard in such cases are clearly set out by Eldon L.C., in two of his judgments.

In the case of the *Attorney-General* v. *Green,* 1 Jacob & Walker 303, he observes:-

It is the duty of the court to take care that as little expense as possible should be incurred by the charity estate.

I apprehend the Legislature was very careful when it passed that Act (Romilly's) seeing that some abuses might arise from the proceeding by petition to provide that no one should proceed in that way without the approbation of the Attorney-General or the Solicitor-General. Here it was presented without that sanction. . . . It is clear that the order on the petition must be considered as a nullity."

In *Kader Mydin & Ors.* v. *Hadjee Abdul Kader*[4] was a suit to have it declared that certain lands were the subject matter of a charitable devise. Defendant took preliminary objection that the Attorney-General should have been a party to the suit. Wood J. said in his judgment (at page 490):

"I am of opinion that the objection is not premature and that the Attorney-General is properly required to be a party, this being a suit relating to charity funds. The case of *Mossil* v. *Lawson* is contrary to the general run of authorities, and being a very old case, cannot be looked on as an authority. I shall order the adjournment of the case, so that the plaintiff may insert the name of the Attorney-General as a party."

In *Cheah Ewe Chong's* case, *supra,* Whitley J. raised the same question:

"That being so, the question arises as to what is the best course to pursue having in mind always the best interests of charity. As Eldon L.C., pointed out in the case of *Attorney-General* v. *Green, supra,* it is the duty of the court to take care that as little expense as possible should be incurred by the charity estate, and the court has in many instances relaxed in favour of charities the rigour of its rules of procedure.

Examples are given in Tudor on Charities, 5th edn., 351. An action may by amendment of the writ and statement of claim be turned into an information and action, the necessary sanction of the Attorney-General being obtained. *Caldwell* v. *Pagham Harbour Reclamation Company,* (1876) 2 Ch.D. 221.

This case was followed by Wood J., in the Penang case of *Hajee Abdullah* v. *Khoo Tean Tek,* 1 Kyshe 500, where the plaintiffs having obtained leave to use the name of the Attorney-General moved *ex parte* for an order to amend the pleadings by inserting the name of the Attorney-General as plaintiff and adapting the pleadings to the new state of facts. The amendment was allowed on payment of the costs occasioned thereby. Two alternatives thus appear to be open to me. I should not in any case dismiss the suit as that might hereafter raise a question of *res judicata.* I can either set aside all proceedings or make an order similar to that made in Suit No. 724 of 1930, already referred to, giving the plaintiffs the opportunity of obtaining the leave of the Attorney-General. The latter course would seem to me the better in the interests of all parties as it will save the expense of instituting proceedings anew."

In the context of section 9 of our Ordinance it is my view that the provision of subsection (2) does not by itself justify that the whole proceeding should be set aside at this stage. In the instant case I therefore propose to make an order that the plaintiff do within two weeks hereof comply with the provision of subsection (1) of section 9 of the Government Proceeding Ordinance, 1956 in default thereof all proceedings shall be set aside with costs to be taxed to be paid by the plaintiff to the first, second and third defendants. Costs of the present application and incidental thereto to the first three defendants in any event. My order made on February 10, 1975 in chambers varied accordingly.

Order accordingly.

Solicitors: *Lim Kean Chye & Co.; Yeoh Kean Teck & Co.; H.L. Sharma.*

S. A. ANDAVAN v. REGISTRAR OF TITLES, NEGERI SEMBILAN & ORS.

[O.C.J. (Ajaib Singh J.) September 23, 1975]

[Seremban — Originating Summons No. 61 of 1974]

Practice & Procedure — Judgment in default — Judgment obtained irregularly — Non-compliance with the rules — Whether court may set aside — R.S.C. 1957, O.4 r.2(3) to (5), O.13 rr.3, 12, O.27 r.11, O.40 r.1 — National Land Code, ss. 323(1), 335, 338 & 417.

Practice and Procedure — Litigation — Rules of procedure.

A loan of $18,000 was given by the applicant to the second respondent on November 23, 1966 on security of land which was charged to the applicant. Upon realising that Lot 1682 was not included in the charge the applicant caused a private caveat to be entered against Lot 1682 on January 11, 1967. The applicant foreclosed the charge in respect of Lot 2149 and realised a sum of $11,057.55. On August 30, 1967 the applicant filed Civil Suit 133 of 1967 against the second respondent for the balance of $6,942.45 and on September 4, 1967 the applicant obtained an order that his private caveat entered against Lot 1682 be extended until the conclusion of the action in Civil Suit 133 of 1967. Meanwhile on May 26, 1967 the second respondent executed a transfer of Lot 1682